No. 87-2108

In The

Supreme Court of the United States

October Term, 1988

The Blackfeet Indian Tribe,

Petitioner,

vs.

The Montana Power Company, a Montana Corporation; the United States of America; and Donald P. Hodel, Secretary of the Interior,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of the Interior exceeded his authority by allowing fifty-year terms for natural gas pipeline rights-of-way crossing the Blackfeet Reservation.

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TABLE OF AUTHORITIES

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, The Montana Power Company, respectfully urges that the Blackfeet Tribe's (Tribe) Petition for Writ of Certiorari (Petition) to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 24, 1988, and its Opinion entered on January 28, 1988, be denied for the reasons stated herein.

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OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 838 F.2d 1055 (9th Cir. 1988), *reh'g denied*, — F.2d — (March 21, 1988), and is reprinted in the Appendix at 1-10. The opinion of the United States District Court for the District of Montana is unpublished and is reprinted in the Appendix at 11-18.

Other jurisdiction and statutory provisions have been supplied to the Court by the Tribe in its Petition at 1-2.

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STATEMENT OF THE CASE

Between the years 1961 and 1969, the Secretary of the Interior (Secretary) granted The Montana Power Company (MPC)[1] rights-of-way for natural gas pipelines

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1 MPC is a corporation incorporated in the State of Montana. Its subsidiaries that are not wholly owned are as follows: Intermountain Digital Network, Inc., a Montana corporation.

crossing the Blackfeet Indian Reservation. Pursuant to the Act of February 5, 1948, (hereinafter 1948 Act), 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328 (1982)), App. at 23, 24, the Secretary approved these rights-of-way for fifty year terms. Significantly, the Tribe consented to each right-of-way as reflected in various Tribal resolutions.

MPC did not gratuitously receive these rights-of-way. For example, in consideration for the rights-of-way to which the Tribe consented on May 26, 1961, MPC agreed to extend gas service to Browning and East Glacier, Montana, and to purchase gas discovered on the reservation that could be economically taken and marketed.[2] In consideration for the right-of-way granted September 27, 1962 and for the right to drill oil and gas in portions of Sections 6 and 8, Township 37 North, Range 7 West, MPC paid the Tribe bonuses of $1,627.60 and $1,638.40, respectively, and has paid the Tribe royalty for extracted oil and gas.[3]

The Tribe did not object to any of the rights-of-way it had granted until April 28, 1981. On this date, the Tribe passed a resolution asserting that in 1961 the Tribe had granted MPC rights-of-way for only twenty year terms pursuant to the Act of March 11, 1904 (hereinafter 1904 Act), 33 Stat. 65 (codified as amended at 25 U.S.C. § 321 (1982)), App. at 21, 22, 23, rather than fifty year terms, and demanded that MPC renew its right-of-way authorization prior to May 31, 1981. MCP balked at this demand because the Tribe had agreed to fifty year terms for all rights-of-way granted.

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2 Excerpt of Record at 72, 75, 119 and 120.

3 Excerpt of Record at 81 and 82.

From 1981 to 1983, MPC and the Tribe attempted unsuccessfully to resolve the right-of-way issue, among other issues. On December 16, 1983, the Tribe filed suit against MPC, the United States and the Secretary. The parties filed cross motions for partial summary judgment on the right-of-way issue, thereby indicating that no genuine issues of material fact existed. The district court granted MPC, the United States and the Secretary partial summary judgment, holding that the Secretary had the authority to grant rights-of-way for fifty years and that the Tribe consented to the rights-of-way granted, including the terms for the rights-of-way. On appeal, the Ninth Circuit affirmed the district court's decision.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals fairly and accurately determined that in granting rights-of-way for natural gas pipelines across Indian lands, an Indian tribe can choose to be bound by either the 1948 Act or the 1904 Act. In this case, the Blackfeet Tribe attempts to persuade this Court that the court of appeals' decision is flawed. The Tribe's arguments are not cogent.

Attempting to paint a different face on an argument that two lower courts have rejected, the Tribe interjects questions of fact not raised before the courts below. For example, the Tribe asks this Court to review the adequacy of payment for the rights-of-way the Tribe granted to MPC and whether the Tribe consented to fifty year terms for the rights-of-way at issue. The Tribe offers no com-

pelling reasons why this Court should accept an invitation to participate in such an extensive fact finding mission.

Though the Tribe attempts to argue otherwise, this case does not present issues that are special or extraordinary. The Ninth Circuit Court of Appeals' decision does not stand at odds with any other reported cases; further, as the Tribe's Petition, perhaps unwittingly, reveals, this case turns more on its own unique facts and, therefore, its resolution is of primary importance to the parties and not the public.

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REASONS FOR DENYING THE PETITION

I. The Tribe Is Asking This Court To Examine Issues of Fact Not Raised Before the Lower Courts

The Tribe strenuously argues that, contrary to the findings of the district court and the court of appeals that the Tribe consented to the fifty year terms for the rights-of-way at issue, the record does not support these findings, and that this Court should remand the case for a factual determination of this issue. Petition at 10, 13. This argument is not persuasive for two reasons.

First, the Tribe did not raise this specific consent issue before the district court or the court of appeals. The consent issue is noticeably absent from the issues the Tribe framed for Ninth Circuit consideration. App. at 25. Though the Tribe did touch on this consent issue in a footnote contained in its Ninth Circuit reply brief, this cursory discussion reveals that the Tribe did not intend to present the issue on appeal for resolution.[4] Further, at the district

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4 Tribe's Reply Brief, n. 3.

court the Tribe filed a cross motion for summary judgment on the right-of-way issue. If the Tribe believed that a genuine issue of material fact existed concerning the terms consented to by the Tribe, it should not have filed that motion or it should have requested a factual determination on the consent question. By filing the motion for summary judgment, the Tribe explicitly recognized that no genuine issues of material fact existed, including that no genuine issue existed concerning consent for the terms of the rights-of-way granted.

Second, because the parties presented no factual disputes, the courts below had little trouble agreeing upon the relevant facts. In its opinion, the district court found that the Tribe had expressly agreed to fifty year term rights-of-way, and the court of appeals similarly concluded that the Tribe had consented to fifty year terms. App. at 10, 18. This Court has consistently decided that it cannot review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Goodman v. Lukens Steel Co.*, — U.S. —, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572 (1987). Here, no such showing can be made because the record and the summary judgment motion reasonably demonstrate that the Tribe consented to the rights-of-way and their terms.

The Tribe further complicates this case and its Petition by requesting the Court to dissect additional matters of fact not raised before the courts below. In its Petition, the Tribe asks this Court to carefully ponder whether the Tribe made a considered choice to grant the pipeline rights-of-way under the 1948 Act rather than the 1904 Act, or whether the Tribe was properly compensated for the rights-of-way. Petition at 13. In making these requests,

the Tribe not only asks this Court to review evidence and discuss specific facts, a task normally beyond certiorari review, *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925 (1925), but also asks it to review facts not raised below. Certiorari is not meant to resolve such factual tangles; therefore, the Tribe's requests are inappropriate.

II. The Court of Appeals' Decision Does Not Conflict With A Decision Of Any Other Court

The Tribe cites *Plains Elec. Generation & Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), as a case that directly conflicts with the lower courts' opinions. For the following reasons, *Plains Electric* has no bearing on the case before this Court.

Plains Electric concerned a condemnation action by Plains Electric Generation & Transmission Coop. under the State of New Mexico's power of eminent domain. Initially, Plains Electric sought to condemn lands of the Pueblo of Laguna Indians under the Act of of May 10, 1926, 44 Stat. 498 (repealed 1976), an Act that allowed for condemnation under the laws of the State of New Mexico without the consent of the Indians or the Secretary. The Tenth Circuit Court ruled that the Act of April 21, 1928, 45 Stat. 422 (codified as amended at 25 U.S.C. § 322 (1982)), and the 1948 Act implicitly repealed the Act of May 10, 1926. In its decision, the court did not critically evaluate the 1904 and 1948 Acts. Also, though the court correctly concluded that the 1904 and 1948 Acts, along with other Acts, constitute a comprehensive scheme that completely covers the subject of rights-of-way, it neither stated nor even remotely implied that the 1904 and 1948

Acts constitute together *one* right-of-way scheme, the 1904 Act supplying the specific terms and the 1948 Act the general terms. In summary, *Plains Electric* did not address the issue outstanding in the present case.

The Tribe further argues that the court of appeals' decision has created confusion and uncertainty. Petition at 6, 9. This argument, however, is not in accord with the court's opinion. In its opinion, the court of appeals held that the Tribe could have consented to rights-of-way governed by the 1904 Act or the 1948 Act. App. at 9, 10. Thus, the decision has created a choice, not confusion, and will promote flexibility in right-of-way negotiations between a tribe, individual landowners and a party seeking a right-of-way. The court's decision has enhanced a tribe's negotiating position, and in doing so has fulfilled the letter and spirit of the 1948 Act and the regulations issued thereunder.

III. This Case Does Not Raise An Issue That Is Of National Significance

In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923) this Court, in reviewing what it called "an ordinary patent case," 261 U.S. at 388, succinctly enunciated the guiding principle that it will not grant a writ of certiorari "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . ." 261 U.S. at 393.

The Tribe seeks this Court's review of a case involving rights-of-way for gas pipelines across the Blackfeet Reservation. While this case has been proceeding through the judicial system, gas explorers have continued

their pursuit of this elusive fuel; rights-of-way have been granted across Indian lands; for those who have been diligent—and lucky—gas has been tapped and sold; and gas has continued to flow through pipelines crossing the Blackfeet Reservation to its ultimate consumer destination. This case has not affected and will not affect these fundamental activities. To be sure, the parties in this case are vitally interested in the resolution of the issues; however, the public's fundamental interests and rights are not at stake in this case, no matter the outcome.

A sure sign that a resolution of this case is of primary importance to the parties and not the public is that the Tribe, as discussed above, has for the most part presented a case to this Court that revolves around a unique set of facts. These facts are of interest only to the parties and have no significance beyond the limited confines of this case.

CONCLUSION

The decision of the Ninth Circuit was fair and it accurately applied the law and regulations. Certiorari, therefore, should be denied.

Respectfully submitted,

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July, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE,
Plaintiff-Appellant,

v.

THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior,
Defendants-Appellees.

No. 87-3697

D.C. No.
CV-83-219-GF

OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
December 11, 1987—Seattle, Washington

Filed January 28, 1988

Before: Eugene A. Wright, J. Blaine Anderson and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Anderson

COUNSEL

Jeanne S. Whiteing, Boulder, Colorado, for the plaintiff-appellant.

Michael P. Manion, Butte, Montana; Edward J. Shawaker, Land and Natural Resources Division, Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

ANDERSON, Circuit Judge:

The Blackfeet Indian Tribe seeks to have rights-of-way granted over tribal lands invalidated. The appeal presents the question of whether the Secretary of the Interior exceeded his authority by allowing a fifty-year term for natural gas pipeline rights-of-way across Blackfeet tribal lands. We hold he did not.

I.

Between 1961 and 1969, the Secretary of the Interior ("Secretary") granted The Montana Power Company ("MPC") five rights-of-way for natural gas transmission pipelines across Blackfeet Indian Tribe ("Tribe") lands on the Blackfeet Indian Reservation in Montana. Each right-of-way was granted by the Secretary pursuant to his approval power, and each was for a fifty-year term. At the time of approval, the Tribe also consented to each right-of-way.

In 1981, the Tribe objected to the fifty-year term and notified MPC of its objection. The Tribe contended the terms were limited to twenty rather than fifty years. MPC responded by stating that it was entitled to the fifty-year terms approved by the Secretary.

In 1983, the Tribe filed the present suit, alleging the pipeline rights-of-way granted MPC were limited to twenty years and the Secretary exceeded his authority in approving longer terms. Under the twenty-year period,

the Tribe alleged the right-of-way had expired and MPC was therefore occupying the land as a trespasser.[1]

The district court granted MPC, the United States, and the Secretary partial summary judgment, declaring that the rights-of-way were for fifty years and therefore had not expired. The court held the Secretary did not exceed his authority in approving the rights-of-way for fifty years and that the Tribe had consented to these terms. The district court later issued a Fed. R. Civ. P. 54(b) order of finality on the grant of partial summary judgment. The Tribe immediately appealed.

II.

In 1904, Congress enacted a statute authorizing the Secretary to grant rights-of-way as easements for oil and gas pipelines through any Indian reservation for a period no longer than twenty years. The statute reads as follows:

> "The Secretary of the Interior is authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation . . . *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. The right to alter, amend, or repeal this section is expressly reserved."

25 U.S.C. § 321, 33 Stat. 65, Act of March 11, 1904.

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[1]At the time this case was submitted on appeal, the twenty-year period had expired on four of the rights-of-way. The fifth will expire in 1989.

With the 1904 Act still in effect, in 1948 Congress passed the Indian Right-of-Way Act. The 1948 Act empowered the Secretary to grant rights-of-way across Indian lands for all purposes. The statute provides:

> "The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians."

25 U.S.C. § 323, 62 Stat. 17, Act of February 5, 1948. The 1948 Act included a second statute which required tribal consent for rights-of-way, stating, in relevant part: "No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324, 62 Stat. 18. Additionally, the 1948 Act provided that:

> "Sections 323 and 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act, . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed."

25 U.S.C. § 326, 62 Stat. 18.

Pursuant to the authority granted by the 1948 Act, 25 U.S.C. § 323, empowering the Secretary to grant rights-of-

way "subject to such conditions as he may prescribe," the Secretary promulgated a regulation in 1960 which allowed rights-of-way for oil and gas pipelines for a period not to exceed fifty years:

> "All rights-of-way granted under the regulations in this part shall be in the nature of easements or permits for the period stated therein. They are terminable upon abandonment or discontinuance of the use for which granted. Rights-of-way for railroads, telephone lines, telegraph lines, public highways, and water control projects including but not limited to dams, reservoirs, flowage easements, ditches and canals shall be without limitation as to term of years. Rights-of-way for all other purposes shall be for a period of not to exceed 50 years, as fixed by the Secretary and stated in the grant, and shall be subject to renewal for a like term upon compliance with the applicable regulations."

25 C.F.R. § 161.19 (1960). In 1968, the regulation was amended to allow the Secretary to grant rights-of-way for *all* easements, *including* oil and gas pipelines, for an unlimited term of years. 25 C.F.R. § 161.18 (1968). *See also United States v. Mitchell*, 463 U.S. 206, 223 (1983).

However, the regulation promulgated pursuant to the 1904 Act limited oil and gas pipeline rights-of-way to not more than 20 years: "Rights of way, granted under [25 U.S.C. § 321], for oil and gas pipelines, . . . shall not extend beyond a term of 20 years. . . ." 25 C.F.R. § 161.25 (b)(1968). Thus the rights-of-way acquired by MPC could be subject to section 161.18 covering all rights-of-way and allowing unlimited terms; or subject to section 161.25(b) covering only oil and gas pipeline rights-of-way and limiting the term of years to not more than twenty; or subject

to the original regulation, 25 C.F.R. § 161.19 (1960), providing for not more than a fifty-year term for all rights-of-way.

Because the rights-of-way at issue here were limited to fifty years, we need not consider the validity of the 1968 amendment insofar as it allowed terms in excess of fifty years. Also, we note that each regulation was promulgated pursuant to the authority of the Acts of 1904 and 1948. As a result, the essential question is whether the 1904 Act, 1948 Act, or both, control the five rights-of-way the Secretary granted MPC.[2]

III.

Since we are reviewing an issue involving statutory construction and a grant of summary judgment, the standard of review is *de novo*. *Native Village of Stevens v. Smith*, 770 F.2d 1486, 1487 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986). However, when faced with an issue of statutory construction, we give deference to the agency charged with administering that statute. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616, *reh. den.*, 380 U.S. 989 (1965); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 552 (9th Cir.), *cert. denied*, 464 U.S. 960 (1983). Consequently, we will sustain the Secretary's construction of the statutes if it is reasonable, even though another construction appears equally plausible. *Southern Pacific*, 700 F.2d at 552; *Lanning v. Marshall*, 650 F.2d 1055, 1057 n.4 (9th Cir. 1981).

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[2]In answering this question as we do, we find it unnecessary to determine which of each of the five rights-of-way was granted pursuant to the authority of which Act.

IV.

The starting point for an issue involving statutory construction is the language in the statute itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Where two statutes are involved, legislative intent to repeal an earlier statute must be clear and manifest. In the absence of such intent, apparently conflicting statutes must be read to give effect to each if such can be done by preserving their sense and purpose. *Id.* at 267; 1A *Sutherland Stat. Const.* § 23.09 (4th Ed. 1985) (if the inconsistency between a later act and an earlier one is not fatal to the operation of either, the two may stand together and no repeal will be effected). This is because statutory repeals by implication from a later enacted statute are disfavored. *SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1118 n.5 (9th Cir. 1976). Also, where possible, we resolve legal ambiguities in favor of Indians, but we cannot ignore the plain intent of Congress. *See South Carolina v. Catawaba Indian Tribe*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986).

Here the language in neither Act speaks to the relationship of the Acts *inter se*. We therefore look to congressional intent with an eye toward upholding both statutes. *Id.* The 1904 Act is specific. It authorizes the Secretary to grant rights-of-way for oil and gas pipelines for up to a twenty-year period. 25 U.S.C. § 321. The later enacted Act of 1948 is more general; it grants the Secretary the power to grant "rights-of-way for *all* purposes" subject to the conditions he prescribed. 25 U.S.C. § 323. Additionally, the 1948 Act stated that it was not to "in any manner amend or repeal . . . any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands. . . ." 25 U.S.C. § 326.

There is no express congressional intent to repeal § 321, even with the law's unaffected language contained in § 326. In 1904, the Secretary was given the authority to grant easements for oil and gas pipelines. Later, in an attempt to broaden the Secretary's powers in granting rights-of-way for access to Indian lands for other purposes, the 1948 Act was passed. It was meant to "satisfy the need for simplification and uniformity in the administration of Indian law." H.R. Rep. No. 739, 80th Cong. 1st Sess., *reprinted* in 1948 U.S. Code Cong. & Admin. News 1033, 1035. To avoid confusion, the existing special purpose statutes (such as section 321) were preserved in anticipation of implementation of the general purpose statute of § 323. *See Id.* at 1036; 25 U.S.C. § 326.

The Act of 1904 and the Act of 1948 can be read as coexisting. The former allows a term of 20 years, the later a term of 50 years. No matter which term the Secretary permits, the consent of the Tribe is still required. 28 U.S.C. § 324. Presumably, if the Tribe did not approve a 50-year term, approval of a 20-year term would be much more likely. In either case, the Tribe has preserved its election and its ability to protect Tribal interests. Thus the two Acts are not in direct conflict, and effect can be given to each while still preserving their sense and purpose. *See Watt v. Alaska*, 451 U.S. at 267.

Analogous cases support this view. In *Nebraska Public Power District v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983), the court held that the 1948 Act did not impliedly repeal the Indian General Allotment Act of 1901, 25 U.S.C. § 357, and its condemnation statute. In this, the court found the 1901 Act and the 1948 Act were

not in irreconcilable conflict and effect could be given to each. *Id.* Moreover, in so holding, the court relied on the Ninth Circuit decision of *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959), where we held that the 1948 Act and § 357 provided two means of easement across Indian land for electric transmission lines. *Id.* at 960. We reaffirmed this analysis in *Southern California Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982), *cert. denied*, 450 U.S. 1051 (1983).

On this basis, we shall follow the Eighth Circuit's analysis in *Nebraska Public Power* with respect to reconciling § 321 with the 1948 Act. The oil and gas pipeline statute, 25 U.S.C. § 321, is not distinguishable in any significant degree as far as the congressional intent is concerned from the allotment statute, 25 U.S.C. § 357, at issue in *Nebraska Public Power*.

The Tribe argues *Nebraska Public Power* is distinguishable because the 1901 Act did not require tribal consent. Also, the Tribe argues that the 1904 and 1948 Acts are not separate and distinct because they both provide the same method of acquiring rights-of-way.

We find the Tribe's arguments unpersuasive. The fact that the 1901 Act did not require consent does not distinguish the *Nebraska Public Power* analysis as far as the congressional purpose of the 1948 Act with respect to earlier specific statutes is concerned. Moreover, while the 1901 and 1948 Acts provide the same method of acquiring a right-of-way, this does not mean applying the former negates application of the latter.

Since effect can be given to both the 1904 and the 1948 Acts, both should be applied. This gave the Tribe a

choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute. The Tribe consented to a 50-year term. The term of years was controlled by both Acts and the Secretary did not exceed his authority in providing regulations allowing 50-year terms.

V.

We hold the term of years for the rights-of-way can be either 20 or 50 years. Since the Tribe consented to the 50-year term, the Secretary's regulations with respect to term of years are valid. The district court properly entered judgment for MPC and the Secretary. Consistent with our holding, we find the Tribe is not entitled to attorney's fees.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

The Blackfeet Indian Tribe,
Plaintiff,

v.

Montana Power Company, a Montana corporation; The United States of America; and Donald Paul Hodel, Secretary of Interior,
Defendants.

JUDGMENT
IN A
CIVIL CASE

Filed November 24, 1986

CASE NUMBER:
CV-83-219-GF

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Montana Power Company's motion for partial summary judgment be, and the same hereby is, GRANTED.

November 24, 1986
Date

LOU ALEKSICH, JR.
Clerk
Carol A. Henderson
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE BLACKFEET INDIAN TRIBE, *Plaintiff,*	)	
vs.	)	NO. CV-83-219-GF
MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD PAUL HODEL, SECRETARY OF INTERIOR, *Defendants.*	)	MEMORANDUM AND ORDER (Filed Nov. 24, 1986)

The above-entitled action is presently before the court on cross-motions for partial summary judgment. The Blackfeet Indian Tribe ("the Tribe") originally filed suit against the Montana Power Company ("MPC"), the United States, and the Secretary of the Interior ("the Secretary"), alleging various violations of oil and gas leases between the Tribe, as lessor, and MPC. The Tribe further alleges certain pipeline rights-of-way granted to MPC have expired and, therefore, MPC's continued use of the rights-of-way constitutes a trespass. The cross-motions for summary judgment address the sole issue of whether the rights-of-way have expired. Jurisdiction vests with this court pursuant to 28 U.S.C. § 1362.

FACTS

The Secretary granted MPC five pipeline rights-of-way across the Tribe's land between the years 1961 and 1969. The Tribe consented to each right-of-way as evi-

denced by various tribal resolutions. Furthermore, each right-of-way was approved by the Secretary pursuant to the Act of February 5, 1948, 25 U.S.C. §§ 323-328, for a term of 50 years.

The Tribe first objected to these rights-of-way on April 28, 1981, when it passed a resolution asserting the rights-of-way granted MPC were only for a term of 20 years. The Tribe claims the Act of March 11, 1904, 25 U.S.C. § 321 ("1904 Act"), established 20 year terms for pipeline rights-of-way and, therefore, the Secretary exceeded his authority in granting 50 year rights-of-way to MPC. Furthermore, the Tribe believes, based on its interpretation of the applicable statutes, that the various rights-of-way granted MPC have expired and MPC's continued use of them constitutes a trespass.

On the other hand, MPC submits it expressly applied for and was granted 50 year rights-of-way by the Tribe's Superintendent. MPC relies on the Act of February 5, 1948, 25 U.S.C. §§ 323-328 ("1948 Act"), which does not set any specific term of years for rights-of-way.

DISCUSSION

The primary issue before the court is whether the Secretary, or his delegate, had the authority to grant a 50-year pipeline right-of-way. In resolving this issue, the court must decide whether the 1904 Act or the 1948 Act governs rights-of-way across Indian lands.

The Secretary, prior to 1948, possessed authority under various special purpose access statutes to grant different types of easements across Indian lands. *Nebraska Public Power District v. 100.95 Acres of Land*, 540 F.Supp.

592, 597-598 (Neb. 1982). One such statute was the 1904 Act, which authorized the Secretary to grant rights-of-way for oil and gas pipelines across Indian lands. The 1904 Act specifically limits such rights-of-way to 20 year terms. 25 U.S.C. § 321.

In 1948, Congress enacted a comprehensive, general purpose right-of-way statute entitled "The Indian Right-Of-Way Act of 1948" ("1948 Act"). The 1948 Act empowered the Secretary to grant rights-of-way for all purposes over and across Indian lands. 25 U.S.C. § 323. Furthermore, it set no limits on the term of any rights-of-way.

The 1948 Act was originally meant to simplify the granting of rights-of-way across certain Osage Indian lands in Oklahoma. S.Rep. No. 823, 80th Cong., 2nd Sess. 2 (1948). However, that Act was later amended to encompass rights-of-way across all Indian lands.

In expressing his support for the amended bill, Under Secretary of the Interior Oscar L. Chapman commented:

> It will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.
>
> * * *
>
> When it is discovered that an application for a right-of-way may not be granted under existing statutory

> authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this Department and becomes a time and money consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

S.Rep. No. 823, 80th Cong., 2nd Sess. 3-4 (1948).

As discussed above, the 1948 Act was intended to simplify the means of acquiring rights-of-way over Indian lands. *Nebraska Public Power District v. 100.95 Acres of Land, supra,* 540 F.Supp. at 598; S.Rep. No. 823, 80th Cong., 2nd Sess. 3 (1948). However, the 1948 Act specifically refused to repeal any existing statutes empowering the Secretary to grant rights-of-way over Indian land. *See,* 25 U.S.C. § 326. In commenting on the proposed 1948 Act, Under Secretary of the Interior Chapman stated:

> In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands. . . .

S.Rep. No. 823, 80th Cong., 2nd Sess. 4 (1948).

MPC cites Under Secretary Chapman's comments in support of its position that the 1948 Act created an independent statutory scheme for acquiring rights-of-way and not a scheme dependent upon other statutory authority, specifically the 1904 Act. MPC contends the 1948 Act addresses rights-of-way for all purposes and provides the Secretary broad authority to issue regulations implementing the Act, including the authority to regulate the term of rights-of-way. Because Congress did not repeal the 1904 Act, MPC submits that parties negotiating a right-of-way agreement can choose to be governed by the 1904 Act or the 1948 Act, depending on which Act they cite in the application. In the instant case, MPC applied for a 50-year right-of-way and received the same from the Secretary under the 1948 Act. Therefore, MPC asserts the Secretary did not exceed his authority and the 50-year right-of-way should be upheld.

On the other hand, the Tribe maintains the two Acts combine to create one scheme governing pipeline rights-of-way with the 1904 Act establishing the term of years. According to the Tribe, the 1904 Act provides the specific terms of the right-of-way and the 1948 Act provides the more general terms in addition to filling the gaps where existing right-of-way legislation was inadequate. Therefore, the Tribe asserts that the 1904 Act, being specifically preserved by the 1948 Act, establishes a 20-year term for MPC's pipeline rights-of-way.

A careful reading of the 1904 and 1948 Acts, together with their legislative histories, leads this court to conclude the two Acts create separate and independent means of acquiring rights-of-way across Indian lands. In enacting

the 1948 Act, Congress did not specifically require the 1904 and 1948 Acts be jointly construed to establish the terms and conditions for oil and gas pipeline rights-of-way. Furthermore, Congress did not specifically exclude oil and gas pipeline rights-of-way from the 1948 Act.

The plain language of the 1948 Act gives the Secretary authority "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe. . . ." 25 U.S.C. § 323. One condition the Secretary could reasonably prescribe in granting rights-of-way under 25 U.S.C. § 323 is the term of such rights-of-way. Furthermore, when the rights-of-way at issue were granted, the Department of the Interior's administrative regulations permitted 50-year terms for oil and gas pipeline rights-of-way. 25 C.F.R. § 161.19 (1960). Therefore, in granting MPC 50-year rights-of-way, the Secretary was merely exercising the power Congress had bestowed upon him.

Finally, Under Secretary Chapman's comment that the earlier right-of-way statutes were being preserved "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new,"[1] is indicative of Congress' intent in enacting the 1948 Act. The court concludes Congress intended to create a separate and independent means of acquiring rights-of-way, and not a means dependent on the earlier 1904 Act.

The Tribe further alleges that the more specific 1904 Act should govern the more general 1948 Act. In evaluating a statute, the test is the manifested intention of Congress, and not whether the statute is general or specific. *Nicodemus v. Washington Water Power Company*, 264

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[1]S Rep. No. 823, 80th Cong., 2nd Sess. 4 (1948).

F.2d 614, 617 (9th Cir. 1959). In the instant case, the Tribe's argument fails because Congress clearly manifested its intent that the 1948 Act empowers the Secretary to grant rights-of-way for all purposes.

The 1904 and 1948 Acts represent separate and independent means of acquiring rights-of-way. In the instant case, the parties expressly agreed to 50-year rights-of-way under the 1948 Act. In approving those rights-of-way, the Secretary did not exceed his authority under the 1948 Act.

For the reasons cited herein,

The court concludes the rights-of-way granted MPC by the Tribe were for a (sic) terms of 50 years. Therefore,

IT IS HEREBY ORDERED that MPC's motion for partial summary judgment be, and the same hereby is, GRANTED, and the Tribe's motion for partial summary judgment is DENIED.

DATED this 24 day of November, 1986.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE,	)	
Plaintiff-Appellant,	)	NO. 87-3697
vs.	)	CV-83-219-GF
THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior,	)	(Filed March 31, 1988)
Defendants-Appellees.	)	

APPEAL from the United States District Court for the GREAT FALLS District of MONTANA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the GREAT FALLS District of MONTANA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered FEB 24, 1988.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BLACKFEET INDIAN TRIBE, *Plaintiff-Appellant,* v. THE MONTANA POWER COMPANY, a Montana corporation; THE UNITED STATES OF AMERICA; and DONALD P. HODEL, Secretary of the Interior, *Defendants-Appellees.*	NO. 87-3697 D.C. No. 83-219-GF ORDER (Filed March 21, 1988)

Before: WRIGHT, ANDERSON, and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is DENIED.

The Act of March 11, 1904, 33 Stat. 65 (codified as amended at 25 U.S.C. § 321 (1982)) provides:

> CHAP. 505.—An Act Authorizing the Secretary of the Interior to grant right of way for pipe lines through Indian lands.
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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. [No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior]:[5] *Provided,* That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all

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5 Amended in 1917 to read: "Before title to rights-of-way applied for hereunder shall vest, maps of definite location shall be filed with and approved by the Secretary of the Interior: Provided, That before such approval the Secretary of the Interior may, under such rules and regulations as he may prescribe, grant temporary permits revocable in his discretion for the construction of such lines."

other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and case: *Provided,* That the rights herein granted shall not extend beyond a period of twenty years: *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the ex-

piration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved.

The Act of February 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328 (1982)) provides:

AN ACT

To empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands or nations.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

SEC. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of

the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

SEC. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

SEC. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

SEC. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

SEC. 7. This Act shall not become operative until thirty days after its approval.

STATEMENT OF ISSUES PRESENTED

1. Whether the term for oil and gas pipeline rights-of-way across Indian lands is governed by the Act of March 11, 1904, 33 Stat. 65, 25 U.S. [sic] § 321, or the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328.

2. Whether the Secretary of the Interior exceeded his authority under the Act of February 5, 1948, 25 U.S.C. §§ 323-328, by providing fifty-year terms for pipeline rights-of-way in contravention of the Act of March 11, 1904, 25 U.S.C. § 321.